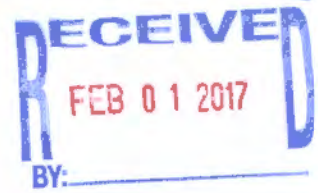


KNIGHT FIRST AMENDMENT INSTITUTE  
AT COLUMBIA UNIVERSITY  
314 Low Library, 535 West 116th Street  
New York, NY 10027



January 31, 2017

**via postal mail**

Environmental Protection Agency  
National Freedom of Information Officer  
1200 Pennsylvania Avenue, NW  
(2822T)  
Washington, DC 20460

**Re: Freedom of Information Act Request  
Expedited Processing Requested**

To whom it may concern,

The Knight First Amendment Institute at Columbia University submits this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records concerning directives reportedly restricting the speech of federal agency employees with the public, with the press, and with Congress.<sup>1</sup>

### **I. Background**

Donald Trump was sworn in as the forty-fifth President of the United States on January 20, 2017. During the inauguration, the National Park Service—a division of the Department of the Interior—republished a social-media post on Twitter showing side-by-side photographs of the National Mall during President Trump’s inauguration and during President Barack Obama’s first inauguration. The photographs showed smaller crowds on the Mall at President Trump’s inauguration.

By the following morning, the Park Service’s Twitter post had been removed. According to press reports, the Trump administration issued an “urgent directive” to the Interior Department to “shut down” all of its

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<sup>1</sup> The Knight First Amendment Institute is a New York not-for-profit corporation based at Columbia University that works to preserve and expand the freedoms of speech and the press through strategic litigation, research, and public education.

Twitter accounts “until further directed.”<sup>2</sup> The Department did so but reactivated the accounts by the following morning, apparently after its “social media guidance ha[d] been clarified.”<sup>3</sup>

The directive issued to the Park Service is reportedly one of many that the government has issued to federal agencies restricting the communications of federal employees. According to press reports:

1. Employees at the Environmental Protection Agency have been told “not to speak to reporters or publish any press releases or blog posts on social media,” and “not to publicize any talks, conferences, or webinars that had been planned for the next 60 days.”<sup>4</sup>
2. Employees at the Department of Agriculture have been told that “all communications with the media should be approved by the administration, and [that] social media posts should be reviewed by managers.”<sup>5</sup>
3. Officials at the Department of Health and Human Services have received a directive “ordering them not to send ‘any correspondence’ to other public officials.”<sup>6</sup>
4. The Department of Transportation has “advised its employees not to publish news releases or engage on DOT’s social media accounts.”<sup>7</sup>

On January 26, 2017, several members of the House of Representatives sent a letter to the White House stating that some of the directives it had issued appeared to prohibit federal employees from communicating with Congress. The letter said that such gag orders would “violate a host of federal laws,” including the Whistleblower Protection Enhancement Act, the Consolidated Appropriations Act of 2016, and 5 U.S.C. § 7211, a law

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<sup>2</sup> *Unflattering Trump Retweets Lead to Twitter ‘shut down’ at Interior Department*, Fox News (Jan. 21, 2017), <https://perma.cc/N8F9-DB88>.

<sup>3</sup> Lisa Rein, *Interior Department Reactivates Twitter accounts after shutdown following inauguration*, Washington Post (Jan. 21, 2017), <https://perma.cc/PVL3-UUVY>.

<sup>4</sup> Valerie Volcovici & P.J. Huffstutter, *Trump Administration Seeks to Muzzle U.S. Agency Employees*, Reuters (Jan. 24, 2017), <https://perma.cc/86LQ-4S3V>; Serafin Gomez, *Trump Admin Institutes Media Blackout for EPA, Suspends Social Media Activity*, Fox News (Jan. 25, 2017), <https://perma.cc/HYR8-U39C>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Andrew Restuccia, Alex Guillén & Nancy Cook, *Information Lockdown Hits Trump’s Federal Agencies*, Politico (Jan. 24, 2017), <https://perma.cc/V3W4-T9S3>.



enacted in 1912 to safeguard the right of federal employees to communicate with Congress.<sup>8</sup>

Several executive officials have claimed that the directives mirror those sent by prior administrations and regulate only official government speech.<sup>9</sup> It is difficult to assess that claim, because the directives remain secret.<sup>10</sup> Based on news reports, however, the directives appear to reach beyond official government speech. Reporters have documented a new unwillingness of some federal employees to talk with members of the press.<sup>11</sup>

In response to the directives, employees of some federal agencies have created pseudonymous, unofficial Twitter accounts. For example, individuals purporting to be employees from at least eleven agencies or components have created unofficial Twitter accounts: NASA, the National Park Service, the Department of Health and Human Services, the Environmental Protection Agency, the Food and Drug Administration, the National Institute of Health, the Center for Disease Control and Prevention, the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service, the U.S. Arctic Research Commission, and the U.S. Forest Service.<sup>12</sup>

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<sup>8</sup> Letter from Elijah E. Cummings, Ranking Member, House Comm. on Oversight & Gov't Reform, and Frank Pallone, Jr., Ranking Member, House Comm. on Energy & Commerce, to Donald F. McGahn, II, White House Counsel (Jan. 26, 2017), <https://perma.cc/665Z-RZNT>.

<sup>9</sup> See, e.g., Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. Times (Jan. 25, 2017), <https://perma.cc/ZP34-FTC8> (quoting a senior EPA official).

<sup>10</sup> As far as we are aware, none of the directives has been published in its entirety. Media organizations have published the text of two memoranda describing the directives to agency personnel, but the government has not confirmed the authenticity of these documents. See Ken Cole, *Leaked Memo Silences Department of Interior*, The Wildlife News (Jan. 24, 2017), <https://perma.cc/6Z8D-K8CX>; William Turton, *National Park Service Banned from Tweeting after Anti-Trump Retweets*, Gizmodo (Jan. 20, 2017), <https://perma.cc/LUD9-HF8K>.

<sup>11</sup> See, e.g., Sharon Lerner, *Government Scientists at U.S. Climate Conference Terrified to Speak with the Press*, The Intercept (Jan. 26, 2017), <https://perma.cc/3FHS-ZQ3F>; Michael Biesecker & John Flesher, *EPA Contact Freeze in Place*, U.S. News & World Report, (Jan 24, 2017), <https://perma.cc/7HBE-L7Z9> (“‘Everybody’s being very cautious’ and erring on the side of not releasing information, one DOT employee said. The employee didn’t have permission to speak publicly and spoke on condition of anonymity.”).

<sup>12</sup> Their accounts appear to include: @RogueNASA, @ResistanceNASA, @AltNatParkService, @AltBadlandsPark, @AltGlacierNPS, @HotSpringsNPS, @AltVocanoesNP, @AltMtRainier, @NatParkUndrgrnd, @AltYelloNatPark,

The directives issued by the government raise significant questions under the First Amendment. While the government may control the message its employees convey on its behalf, the First Amendment generally protects government employees who speak in their private capacities on matters of public concern. Because of the secrecy surrounding the directives, however, it is not clear whether the directives cross the line from controlling official message to restricting constitutionally protected speech.

## II. Records requested

The Knight Institute requests the following documents:

1. All directives, memoranda, guidance, emails, or other communications concerning the speech of government employees or contractors:
  - a. sent by the White House<sup>13</sup> to any federal agency since January 19, 2017, or
  - b. sent by an agency to its employees or contractors since January 19, 2017;
2. All documents drafted by the agency since January 19, 2017 containing policy or legal guidance or interpretation concerning the speech of government employees or contractors;
3. All correspondence between the agency and any of its employees or contractors concerning restrictions on employees' or contractors' speech put in place since January 19, 2017.

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our

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@AngryNatlPark, @AltHHS, @ungaggedEPA, @ActualEPAFacts, @alt\_fda, @Alt\_NIH, @Alt\_CDC, @RogueNOAA, @AltUSFWS, @AltUSFWSRefuge, @AltUS\_ARC, @AltForestServ.

<sup>13</sup> The term "White House" includes, but is not limited to, the Executive Office of the President, the Office of the President, the White House Office, the Office of Counsel to the President, the National Security Council, the Office of the Vice President, the Cabinet, as well as any government officer who directly advises the President or the Vice President as to the legality of, or authority to undertake, any executive action.



request. Please disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b).

We also ask that you provide responsive electronic records in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, please provide the records electronically in a text-searchable, static-image format (e.g., PDF), in the best image quality in the agency's possession, and in separate, Bates-stamped files.

Finally, we ask that you process our request on a rolling basis, giving priority to category 1.

### **III. Application for Expedited Processing**

The Knight Institute requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a “compelling need” for the documents sought because the information they contain is “urgent[ly]” needed by an organization primarily engaged in disseminating information “to inform the public about actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

*A. The Knight Institute is primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The Knight Institute is “primarily engaged in disseminating information” within the meaning of FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II).

The Knight First Amendment Institute is a newly established organization at Columbia University dedicated to defending and strengthening the freedoms of speech and the press in the digital age. Research and public education are essential to the Institute's mission.<sup>14</sup> Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and public are among the core activities the Institute was established to perform. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).

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<sup>14</sup> Mike McPhate, *Columbia University to Open a First Amendment Institute*, N.Y. Times (May 17, 2016), <https://perma.cc/YC9M-LUAD>; James Rosen, *New Institute Aspires to Protect First Amendment in Digital Era*, McClatchy DC (May 20, 2016), <https://perma.cc/ZS2K-FPED>.

*B. The records sought are urgently needed to inform the public about actual or alleged government activity.*

The documents sought are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Specifically, the requested records relate to the Trump administration's issuance of directives to federal agencies restricting the speech of government employees. Those directives have, according to press reports, suppressed the speech of federal employees on matters of public concern. Because the orders and related records remain secret, it is not possible for the public to discern whether the restrictions the orders impose violate the First Amendment or the laws that protect communication between federal employees and Congress.

The records sought have generated intense public interest.<sup>15</sup> In the eleven days since the administration reportedly issued the first directive,

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<sup>15</sup> *See, e.g., Unflattering Trump Retweets Lead to Twitter 'shut down' at Interior Department*, Fox News (Jan. 21, 2017), <https://perma.cc/N8F9-DB88>; Lisa Rein, *Interior Department Reactivates Twitter accounts after shutdown following inauguration*, Washington Post (Jan. 21, 2017), <https://perma.cc/PVL3-UUVY>; Valerie Volcovici & P.J. Huffstutter, *Trump Administration Seeks to Muzzle U.S. Agency Employees*, Reuters (Jan. 24, 2017), <https://perma.cc/86LQ-4S3V>; Serafin Gomez, *Trump Admin Institutes Media Blackout for EPA, Suspends Social Media Activity*, Fox News (Jan. 25, 2017), <https://perma.cc/HYR8-U39C>; Andrew Restuccia, Alex Guillén & Nancy Cook, *Information Lockdown Hits Trump's Federal Agencies*, Politico (Jan. 24, 2017), <https://perma.cc/V3W4-T9S3>; Ken Cole, *Leaked Memo Silences Department of Interior*, The Wildlife News (Jan. 24, 2017), <https://perma.cc/6Z8D-K8CX>; William Turton, *National Park Service Banned from Tweeting after Anti-Trump Retweets*, Gizmodo (Jan. 20, 2017), <https://perma.cc/LUD9-HF8K>; Sharon Lerner, *Government Scientists at U.S. Climate Conference Terrified to Speak with the Press*, The Intercept (Jan. 26, 2017), <https://perma.cc/3FHS-ZQ3F>; Michael Biesecker & John Flesher, *EPA Contact Freeze in Place*, U.S. News & World Report, (Jan. 24, 2017), <https://perma.cc/7HBE-L7Z9>; *Trump Administration Orders Media Blackout at EPA*, Associated Press (Jan. 24, 2017), <https://perma.cc/8XYM-LWH5>; Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. Times (Jan. 25, 2017), <https://perma.cc/ZP34-FTC8>; *Trump Administration Scrutinizing EPA Science*, NBC News (Jan. 24, 2017), <https://perma.cc/9FJ7-RCTN>; Sam Stein & Kate Sheppard, *Federal Workers Told to Halt External Communication in First Week Under Trump*, Huffington Post (Jan. 24, 2017), <https://perma.cc/U4RA-Q8F8>; Dino Grandoni, *USDA Lifts Clampdown on Its Science Division*, BuzzFeed (Jan. 25, 2017), <https://perma.cc/3SQT-UJHC>; P.J. Huffstutter & Richard Valdmann, *USDA Disavows Gag-Order Emailed to Scientific Research Unit*, Reuters (Jan. 24, 2017), <https://perma.cc/UTS6-SV49>; Timothy Cama, *House Dems: Trump's Federal 'Gag Orders' Likely Illegal*, The Hill (Jan. 26, 2017), <https://perma.cc/UCG5-HQVK>; Joel Achenbach, *The Nation's Top Scientists Can't Get Through to Trump—and They're Alarmed*, Washington Post (Jan. 26, 2017), <https://perma.cc/7F3G-DLJC>; Matthew Ingram, *Trump Administration Puts Gag Order on Several Government Agencies*, Fortune (Jan. 24, 2017), <https://perma.cc/3HF4-CP9M>; Jeffrey Mervis, *Firestorm*



dozens of stories about the directives have appeared in the news, including in major national publications. The stories have nearly all revolved around a handful of leaked descriptions of the directives and anecdotal evidence of the fear that they have instilled in federal employees. The public has thus far been denied the benefit of the directives themselves and related documentation. Those records are urgently needed to understand the scope and lawfulness of the administration's restrictions.

For these reasons, the Knight Institute is entitled to expedited processing.

#### **IV. Application for Waiver or Limitation of Fees**

The Knight Institute requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is “likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further the Knight Institute's commercial interest. The Institute will make any information disclosed available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure “that it be liberally construed in favor of waivers for noncommercial requesters.” See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

The Knight Institute also requests a waiver of search and review fees on the grounds that it qualifies as an “educational . . . institution” whose purposes include “scholarly . . . research” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Institute has a substantial educational mission. Situated within a prominent academic research university, the Institute will perform scholarly research on the application of the First Amendment in the digital era. The Institute is in the midst of inaugurating a research program that will bring together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and solutions. It will publish that commentary in many forms—in scholarly publications, in long-form reports, and in short-form essays.

The Knight Institute also requests a waiver of search and review fees on the grounds that it is a “representative[] of the news media” within the

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*over Supposed Gag Order on USDA Scientists Was Self-Inflicted Wound, Agency Says*, Science Mag (Jan. 25, 2017), <https://perma.cc/GHY6-3CYW>.

meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The Institute meets the statutory definition of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *accord Serv. Women’s Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012); *ACLU of Wash. V. DOJ*, No. C09-0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011); *ACLU*, 321 F. Supp. 2d at 30 n.5. Courts have found other non-profit organizations, whose mission of research and public education is similar to that of the Knight Institute, to be “representatives of the news media.” *See, e.g., Cause of Action v. IRS*, No. 13-0920, 2015 WL 5120863 (D.C. Cir. Aug. 28, 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53 – 54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).

For these reasons, the Knight Institute is entitled to a fee waiver.

\* \* \*



Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of it or, where reasonable, to narrow our request.

Sincerely,

/s/ Alex Abdo

Alex Abdo\*

Jameel Jaffer

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\* The Knight First Amendment Institute appreciates the assistance of Ramya Krishnan, María Emilia Mamberti, Alexandra Sinclair, Renata Sayão, and Jeffrey S. Stein in the drafting of this request.